IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.03.2002

CORAM

THE HONOURABLE MR.JUSTICE V.S.SIRPURKAR
AND
THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN

TAX CASE NO.357 OF 1996
(Reference No.346 of 1996)

The Commissioner of Income-Tax,
Tamil Nadu-V
Madras. ... Applicant

Versus

Mr.K.Jeelani Basha
Trichy. ... Respondent

Prayer: Case referred by the Income-Tax Appellate Tribunal, Madras under Section 256(1) of the Income Tax Act, 1961 for decision in R.A. No.296/M/95 in I.T.A.No.570/ Mds/ 1994.

! For Applicant : Mrs.Chitra Venkataraman
Sr.Standing Counsel for Income Tax

For Respondent : Mr.C.V.Rajan for
M/s.D.Padma Prakash and
S.Swarnambikai

: JUDGMENT
(Judgment of the Court was delivered by V.S.SIRPURKAR,J.)

1. The interesting question of law on the backdrop of more interesting facts was referred to us.

2. The question is, "whether on the facts and in circumstances of the case, the Appellate Tribunal was right in law in its interpretation of the provisions of Section 2(47)(v) of the Income Tax Act and not upholding the assessment for the entire capital gains in the assessment for the assessment year 1992-93."

3. Few facts of the case are: The assessee is an individual. He held a large property. The relevant assessment year is 1992-93 for which the relevant previous year ended on 31.3.1992. The assessee had entered into an

agreement on 10.11.1990 with one M/s. Reliance Developments, Coimbatore for the sale of property at No.13, VOC Road, Cantonment, Trichy. The property was vacant land with a building within the Municipal limits. Obviously, the whole idea was to develop the property. The total area of the property was about 36,837 sq.ft and the total consideration agreed was Rs.57 lakhs. The purchaser(hereinafter referred to as "developer") paid a sum of Rs.2 lakhs as advance on the date of agreement and agreed to pay a sum of Rs.15 lakhs within two months from the date of the agreement and further sum of Rs.10 lakhs within a further period of six months. It seems that the developer could not keep up the schedule. Therefore, some modifications were effected with the mutual understanding in the terms of the agreement. As per the modified agreement, the assessee parted with the possession of approximately 1/3rd of the total property on or about 15.6.1 991. He also agreed that he would purchase a residential apartment bearing the area of 4400 sq.ft, which would be eventually put up on the sold property at the consideration of Rs.15,47,000/-. He also agreed that the developer/purchaser would construct a separate building in an area of 5,600 sq.ft at the cost of Rs.8 lakhs and this sum of Rs.15,40,000/- plus Rs.8 lakhs totaling to Rs.23,40,000/- was to be adjusted out of the total consideration. But this adjustment was to be from the last instalment of the consideration payable by the developer to the assessee. The assessee it seems received an amount of Rs.2 2 lakhs out of the consideration on his having parted with approximately one third of the total property. He also added in this Rs.22 lakhs the cost of the building of 8 lakhs, which the developer agreed to construct over an area of 5,600 sq.ft. Thus, the capital gains for 1992-93 were initially calculated on the basis of this Rs.30 lakhs. However, the Assessing Authority calculated the whole capital gains on the basis of the total consideration of the transaction and not on Rs.22 lakhs received by him and after making the adjustments the total capital gains were assessed at Rs.4,74,765/-.

4. Eventually, the assessee moved the Tribunal. (Eventually the assessment has undergone a change inasmuch as the assessee has successfully convinced the Tribunal to ignore Rs.8 lakhs and has paid the capital gains only on the basis of the cash amount of Rs.22 lakhs received by him.) Therefore, we would proceed today only on the basis of Rs.22 lakhs as the consideration received for 1/3rd of the property which was parted with by the assessee in favour of the developer during the assessment year 1992-93.

5. Against the initial assessment made, the assessee carried an appeal before the Commissioner of Income Tax, because the Assessing Authority had calculated the capital gains on the basis of the total consideration of Rs.57 lakhs.

6. It was the contention of the assessee that in that assessment year, he had received only Rs.22 lakhs and therefore the calculation has to be made taking into account that payment alone. He also pointed out that he had parted with the possession of 1/3rd of the property only and not the whole property. Relying on Section 2(47)(v) of the Income Tax Act, he contended that the transfer was only in respect of the 1/3rd of the property and he has received the consideration of Rs.22 lakhs only and therefore the capital gains should be calculated on that basis. The Commissioner of Income Tax did not

accept this contention.

7. However, the Tribunal ultimately accepted this contention and directed that the capital gains would be chargeable during the year only for the immovable property handed over to the purchaser Reliance Developments. Since the sale price had been fixed for the entire property, it was only appropriate that the sale proceeds is allocated pro rata for the possession handed over and the capital gains computed. Accordingly, the Assessing Officer was directed to re-compute the capital gains in the light of the observations made.

8. It is this judgment of the Tribunal, which has been called in question at the instance of the Revenue before us by way of the aforementioned reference.

9. The learned Senior Counsel for the Department urged that even if there was a transfer of 1/3rd of the property by way of handing over the possession thereof to the purchaser, the capital gains of the same have to be calculated on the basis as if the whole property was transferred and therefore the total consideration in the transaction would be the basis for calculation of capital gains. The learned counsel invites our attention to the language of Section 2(47)(v) and points out that thereunder, if the possession is parted with in terms of Section 53A of the Transfer of Property Act, then also such transfer of possession amounts to a transfer within the meaning of Section 45 of the Income Tax. The Section is as under:
"2(47). Transfer in relation to a capital asset includes:
(i) .....
(ii) .....
(iii) .....
(iv) ....
(v) Any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in Section 53A of the Transfer of Property Act, 1882 (4 of 1882)"

10. Relying on this language in the Section, the learned counsel suggests that in this case there was actually a transfer of the capital asset, because the assessee had parted with the possession of the property. Once even a part of the property was given in possession of the vendee, then for the purpose of calculating the capital gains, it would amount to the transfer of the whole property and eventually, the calculation would have to be made not for the consideration actually received for the transferred part, but on the basis of the total consideration agreed to between the parties for the whole transaction.

11. The thrust of the argument of the learned counsel is that the contract could not be dissected as was tried to be done by the Tribunal, in part and it has to be treated as one whole contract and therefore even if the assessee gave a part of the property in possession of the vendee, it should be deemed as if the contract was over and then the capital gains would be liable to be calculated on the total consideration and not on the consideration

actually received in that assessment year.

12. On the other hand, Mr.Rajan, the learned counsel for the assessee contended that the Tribunal had correctly arrived at the legal position and there was nothing to suggest that a contract would not have dissected, particularly, where the intention of the parties was apparent from the agreement. He pointed out that it would be only proper to rely on the delivery of the property and if there is a part delivery of the property, then the proportionate consideration should only be taken into consideration for calculating the capital gains.

13. In this case, the learned counsel points out that in the year 19 92-93, the assessee received Rs.22 lakhs for 1/3rd of the property, which was Rs.3 lakhs more than the proportionate cost of 1/3rd of the property. According to the learned counsel, the proportionate cost would be only Rs.19 lakhs. He however points out that the assessee was assessed on the basis of Rs.22 lakhs by the Tribunal. He then points out that in 1993-94 and 1994-95, the assessee received Rs.7,25,00 0/- and Rs.4,35,000/- respectively, but the assessee did not part with possession of the property and therefore there was no transfer within the meaning of Section 45 in those assessment years. He further points out that in the year 1995-96, the assessee parted with the other 1/3rd part of the property and put the developer in possession and had actually not received even a single farthing, but he was later on assessed as if he had received 1/3rd consideration i.e., Rs.19 lakhs. The same story was repeated for the assessment year 1997-98 also, where the remaining 1/3rd of the property was put in possession of the developer/purchaser. Again, the assessee had not received the single farthing and yet he offered Rs.19 lakhs for the purpose of calculating capital gains. Therefore, the contention of the learned counsel is that in the years 1995-96 and 1997-98, when he parted with 1/3rd of the property in each year, he had offered to pay the capital gains on the moneys which he had never received for those years. Ultimately, the learned counsel argues that all this will show that there is no escaping of any income, because the assessee had offered Rs.22 lakhs in the year 1992-93 and Rs.19 lakhs in the year 1995-96 and Rs.19 lakhs in the year 1997-98 totalling to Rs.60 lakhs treating which as a consideration, the capital gains would be calculated. The learned counsel therefore says that this is not the case where the assessee has escaped or has taken undue advantage of the provisions.

14. The learned counsel also urged that where it could be seen from the terms of the agreement, there was no reason not to dissect the contract and to calculate the capital gains on the basis of the proportionate consideration for the portion of the property which was transferred by way of granting the possession thereof to the vendee. On this backdrop, we have to see as to whether such calculation could be permissible or not.

15. Our attention was invited by the learned counsel to the decision of the Delhi High Court in COMMISSIONER OF INCOME TAX, DELHI VIII VS. SHAKUNTALA RAJESHWAR reported in 160 I.T.R. 840. This was a case where the 17 vendors had transferred a property, which they had agreed to transfer to the vendee, in four assessment years by executing the sale deeds in those four

years. The question for consideration there was as to whether the entire transaction was liable to be considered only in the relevant year 1972-73 or whether the capital gains would be calculated by dissecting the contract as the sale deeds were executed in four years though in pursuance of a single agreement of sale. The Division Bench of the Delhi High Court consisting of Yogeshwar Dayal,J and S.Ranganathan, J (as their Lordships then were) held that there could be a transfer of property only when the relevant sale deeds were executed and registered. It was noted that on the terms of each sale deed, what was transferred was only 1/4th of the interest in property. The entirety of interest of each of the transfers was transferred in four portions in the four sale deeds, which became effective in four different years. There was also no transfer of interest earlier to these deeds. There was therefore no tenable ground at all for suggesting that the capital gains in respect of the entire property could be taxed in only one of the assessment years viz., assessment year 1972-73. Their Lordships held the answer to the question as to whether the capital gains were assessable only in the first year or proportionately in the four years was obvious, clear and self evident and no reference was called for on that question.

16. The learned counsel points out that the principle involved in this reported decision is that the capital gains would be calculated only on the transfer having been effected. Even if there is one transaction and only part of the property is transferred in a particular assessment year, then the capital gains would be calculated on the basis of such part transfer and also of the part consideration received by the transferee. This decision was given when Section 2(47) was not amended. Therefore, their Lordships obviously went by the word " transfer" in strict sense thereof and since there were completed four sale deeds, their Lordships accepted the four transfers to have taken place in four years and therefore eventually held that the capital gains could not be calculated on the basis of the whole transaction or the whole consideration involved therein. The only difference, which is to be perceived today is that the definition of the "transfer" itself has undergone a change. Therefore, what applies to a completed transfer in the aforementioned Delhi High Court judgment would also apply if the transaction in the present case can be covered under Section 2(47) and our finding is, that it can be so covered.

17. In this case, the possession was parted with whereas the assessee/vendor received the consideration therefor. Once the possession, even a part of the property was handed over to the transferee for the purpose of Section 2(47)(v) read with Section 45, the transfer was complete and therefore the tax authorities and more particularly, the Tribunal was justified to calculate the consideration received in that particular year for that part of the property which was parted with. In fact, a reference can be made to the judgment of the Supreme Court in ALAPATI VENKATARAMAIAH VS. COMMISSIONER, INCOME TAX reported in 57 I.T.R. 185, which Mr.Rajan relied upon and pointed out that before the amendment, the transfer was very strictly construed. In the said decision, the Supreme Court refused to accept the agreement to sell or the entries made in the account for the receipt of the consideration by the transferor as a completed transfer for the purpose of then Section 12(b). The Supreme Court observed that the transfer means effective conveyance of capital asset to the transferee and delivery of

possession of immovable could not by itself be treated as equivalent to conveyance of the immovable property. Relying on this judgment, the learned counsel pointed out that the amendment has effected a sea change in law, inasmuch as under Section 2(47), the delivery of possession provided it is in the nature as contemplated in Section 53 A of the Transfer of Property Act, would be enough to bring the transaction into the mischief of the word "transfer". The argument is undoubtedly correct.

18. Section 2(47)(v) has probably been introduced to meet the law laid down in this Judgment, wherein there used to be a transfer for all the practical purposes, but the tax could be avoided only on the sole ground that the transaction was not completed by way of a sale deed. Now, the law having undergone the change, it would be clear that where there would be a transfer of possession in the nature as contemplated under Section 53A of the Transfer of Property Act, the transaction would be covered as a transfer. By the necessary logic then, that transaction would be coverable in that particular assessment year as has been done by the Delhi High Court. The only question was as to whether a transaction could be considered for the purpose of calculation of capital gains in parts. The position in law has been indicated by the Delhi High Court that it can be so treated in parts, we respectfully agree with the Delhi High Court judgment. However, the only conditions would be that (1) such a delivery of possession should be in the nature of a doctrine of part performance under Section 53A for which there should be an agreement between the parties, (2) such agreement should be in writing, (3) a comple ted contract has to be spelt out from that agreement, and the most important (4) the transfer of possession of the property in pursuance of the said agreement. All these conditions undoubtedly and admittedly are completed here. If that is so, then there would be no question of interfering with the Tribunal's judgment. In our opinion, the Tribunal has correctly held that the assessee would have to be assessed on the basis of the transfer of the possession in proportionate to the consideration.
Accordingly, the question is answered against the revenue.

(V.S.S.,J.) (K.R.P.,J.)
04.03.2002

Index:yes/No
Website: Yes

To:
1. The Assistant Registrar
Income Tax Appellate Tribunal
III Floor, Rajaji Bhavan,
Besant Nagar
Madras.
2. The Secretary, Central Board
of Revenue, New Delhi
3. The Asst.Commissioner of

Income Tax, Commercial Circle,
Tiruchirapalli.
4. The Commissioner of Income Tax
(Appeals) VIII,
Madras-34.
5. Commissioner of Income Tax
Tamil Nadu V,
Madras.

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V.S.SIRPURKAR,J.
AND
K.RAVIRAJA PANDIAN,J

T.C.No.357 of 1996

4.3.2002